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No. 84-1781 (3)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

ALL AMERICAN LIFE AND CASUALTY COMPANY,
an Illinois insurance corporation,
Petitioner,

v.

OCEANIC TRADE ALLIANCE COUNCIL INTERNATIONAL, INC.,
a Michigan corporation,
Respondents.

PETITIONER'S REPLY TO RESPONDENTS' RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

Several matters presented in opposition to the Petition for Certiorari call for a response. The organization of this reply conforms to the presentation of the Respondent for purposes of easy reference.

A.

Respondent contends that there is an appropriate standard for application of Rule 403 and that this standard is that whatever is decided by the trial judge is determinative unless the trial judge has committed "a clear abuse of discretion" or the trial judge has acted "arbitrarily or irrationally".

The difficulty with this contention, in present circumstances, is that we are dealing with relevant evidence that concerns the integrity of court procedure and litigant interference with it, and in such a situation this Court has said that the trial tribunal must make inquiry into such claims unless it is manifest that the claims are "irrational or perverse". *Communist Party of the United States* v. *Subversive Activities Control Board*, 351 US 115, 124 (1956).

Reduced to simple terms, Respondent argues for a standard of broad discretion for exclusion of relevant evidence concerning the honor of the administration of justice that this Court has ruled must be considered unless manifestly perverse or irrational. Thus, we have the troublesome situation where an express standard of admission is in blatant conflict with the standard of discretion contended as proper for rulings for admission or exclusion of evidence.

Repeated denials of petitions for certiorari regarding rulings based upon statements of approval of broad discretion on the admission or exclusion of relevant evidence, and the one ruling of this Court in *United States* v. *Abel*, ____ US ____; 105 S. Ct 465 (1984) do not speak directly to the specific problem of this case. We submit that the numerous

rulings by the Courts of Appeals, with varying statements as to the breadth of trial court discretion, when measured by results, reveals a rule demonstrated to be — what is or is not admissible is whatever the trial judge says is or is not admissible. However, whatever may be the shortcomings of a rule that is the cornerstone of the system of proofs that almost invariably defers to the determination of the trial judge, it does not answer the question of this case regarding the admission of a kind of evidence that concerns not only the fact resolution of a particular conflict but the integrity of the process of resolving conflicts.

There can be no question that the offer of evidence, here, is not irrational or perverse. The witness sought to be presented, in a time of great personal stress sought out and found a person of authority he could trust, a Detroit Recorders Court judge, and told that person that attempts at bribery to create testimony or conduct favorable to a litigant had been made. Such testimony, when offered but excluded, and the exclusion ruling is approved by a "flexible standard" that looks only for a "clear abuse of discretion", does nothing in the promotion of the integrity and accountability of a court system.

B.

Among its arguments in support of contentions that the ruling excluding evidence of litigant attempts to obtain testimony by bribery was proper, counsel for Respondent states it countered the testimony of Lonnie Thomas, given at Kiley's murder trial and read to the jury in the case at bar,

> ". . ., by offering a handwritten statement identified by Thomas as his own, wherein Thomas retracted his prior confession to the murder of Guy Willetts." (Response to Petition for Certiorari, p. 7)

This statement, which inplicitly suggests that Lonnie Thomas, by recanting a confession to murder, is a grossly unreliable witness, is patently untrue.

The evidence given by Thomas at the murder trial and read to the jury, here, as it concerns the actions of Thomas in killing Willetts is contained in the Joint Appendix submitted to the Court of Appeals. It plainly states that Thomas killed Willetts by shooting him with two bullets from a forty-five caliber automatic hand gun (261a-263a). The "handwritten statement identified by Thomas as his own" was OTAC's Proposed Exhibit 13, reproduced at (465a-467a) of the Joint Appendix. This statement does not retract the confession of Thomas that he killed Willetts with two slugs from a forty-five.

The contents of the "handwritten statement identified by Thomas as his own" and made at the behest of Robert Delaney shortly prior to the trial of this case (376a-377a), are, however, particularly interesting when compared with the statements made by Thomas to Judge Justin Ravitz that counsel for All American discovered the day prior to the last day of presenting evidence in this case.

The testimony of Thomas at the murder trial, and here, did not reveal any direct evidence of Kiley or Mat Alfei being involved in a conspiracy to have Willetts killed. Such

evidence was provided by Jackson, and the testimony of Thomas, in addition to showing that the end result of the conspiracy was that Willetts was killed, was corroborative of the testimony of Jackson, particularly as it dealt with the prior abortive attempts at killing Willetts.

Thomas testified about his participation in abortive attempts to kill Willetts at the Town Center and at the Rhinoceros Restaurant, among his participation in several abortive attempts to kill Willetts. Regarding the occurrence at the Rhinoceros Restaurant, Thomas gave testimony that, when taken with the testimony of Jackson, might have identified Mat Alfei as a participant (278a). Regarding the occurrence at the Town Center, Thomas testified that Kiley had told him that Kiley had observed Thomas in the Town Center abortive attempt; telling Thomas this when he and Kiley were in a bull pen outside of a courtroom at a pretrial hearing in the murder case (268a-269a).

The pertenent retractions made in the "handwritten statement identified by Thomas as his own" as they concerned Kiley and Mat Alfei, dealt with the abortive attempts at killing Willetts at the Town Center and the Rhinoceros Restaurant. In this statement Thomas wrote:

> ". . . the Town Center and Rhinoceros jobs never came down." (466a)

It is to be noted that this handwriten statement, obtained by Mr. Delaney, as it dealt with Kiley's participation in an abortive attempt on Willetts' life, conforms to what Thomas told Judge Ravitz was the testimony sought by Kiley from Thomas by bribery.

> "He knows that he done told me he was that cat watching me. He knows he offered me the money. He done told me what he was going to do. Just like Delaney, you know, he done offered the money and all this kind of stuff."

Stating untruths as to the contents of a retraction of witness Thomas, when the actual retraction is in substantial identity to testimony Thomas told a judge was the testimony earlier sought to be obtained by bribery is not persuasive that denial of the recall of Lonnie Thomas as a witness was a sound exercise of discretion.

Counsel for Respondent suggests that the statements made to Judge Ravitz by Thomas were noted by the trial judge to be hearsay (Response to Petitions for a Writ of Certiorari, p. 8) in support of contentions that rulings on the exclusion of Thomas' testimony was a fair and proper exercise of discretion. What this ignores is that Thomas was in the lock up at Court, having been brought from prison by a Writ of Habeas Corpus Ad Testificandum so that he could testify. Testimony by Thomas as to bribe offers by Kiley or Delaney would not be hearsay, and arguing that it was so labelled by the trial judge does not persuade that denying Petitioner the right to bring Thomas as a witness was a sound exercise of discretion.

Counsel for Respondent expresses the purpose of Counsel for Petitioner exactly in the italicized portion of the first paragraph on page 9 of its repsonse to our petition. We sought to show that bribery was a method attempted in order to disassociate Kiley, an officer and shareholder of OTAC, from the killing of Willetts for insurance proceeds.

We make no apologies for continuing to pursue the attempt to elicit evidence of bribery attempts by Kiley and Delaney to obtain testimony to disassociate OTAC officers and shareholders from murder for the purpose of profiting from colletion of insurance proceeds. Trial court labelling of this attempt as only a smear of Delaney and OTAC totally ignores the fact that the trial court ordered that Kiley and Delaney be made parties (Memorandum Opinion II, 38a) and that Delaney claims an interest as a creditor of OTAC (385a) in a suit in Oakland County, Michigan, Circuit Court, *Kiley, et al*, v. *OTAC*, No. 82-245205-CK, where for alleged

services and expenses for trial representations prior to the trial of this case, Delaney claims more than $950,000.00 is owing. It also ignores the fact that Delaney has an assignment of all of the OTAC shares of Kiley, Mat Alfei, Richard D. French and the French Group (in total, thirty percent). Proofs directed at Delaney, as counsel, could not seriously compromise OTAC, because in point of fact, Delaney is a substantial portion of OTAC.

Counsel for Respondent argues that the only criminal activity of concern was a claimed conspiracy to murder Willetts, and whether Kiley and Mat Alfei were a part of it. This ignores the fact that evidence of attempts at bribery to present testimony that would disassociate officers and shareholders of OTAC from a conspiracy to kill for profit is, in itself, evidence that officers and shareholders of OTAC did conspire to kill for profit. Criminal activity in an attempt to evade the consequences of criminal activity is also pertinent evidence.

Restating the wholly conclusionary words of the Court of Appeals that it viewed the proffered evidence in the light most favorable to the proponent is not persuasive that the Court of Appeals properly exercised its authority on review. The evidence outlined in the offer of proof (374a-388a), if taken in the light most favorable to the proponent, would be considered an admission by Kiley that he did conspire to kill Willetts to obtain the insurance proceeds for OTAC. No less an authority than *Wigmore on Evidence*, Chadbourne Revision, Sec. 278, says so.

CONCLUSION

For the reasons set forth in the Petition for a Writ of Certiorari and for the additional reasons herein set forth, the Petition should be granted, or, alternatively, a summary reversal of the decision of the Sixth Circuit Court of Appeals should be ordered.

Respectfully submitted,

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